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CONFLICT OF LAWS

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I INTRODUCTION

INDIA'S STATE practice in conflict of laws / private international law is depicted in this annual survey for the year 2018. This year's coverage include matters concerning, jurisdiction (admiralty), contracts, family law, international commercial arbitration and foreign judgment.

II ADMIRALTY JURISDICTION

It is common knowledge that "the admiralty jurisdiction of the high court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship". It has been further established that once the court has correctly exercised jurisdiction, it will continue to always have jurisdiction. Again a valid arrest is what grants the court jurisdiction over a vessel. In *Siva Bulk Limited* v. *M.V. Aodabao*[1] the above mentioned analysis was carried out. This is a case where an admiralty suit was filed in which it was contended on behalf of the first defendant vessel that the suit should be dismissed on the ground that the arrest of the first defendant vessel has been set aside. The facts of the case are that the plaintiff has filed suit in rem against the first and second defendants namely – M.V.Aodabao and M.V.AoHong Ma. It is the case of plaintiff that they have a maritime claim in connection with a charter party entered into with one Cross Ocean Shipping Ltd., Samoa. The plaintiff further sub-chartered the second defendant for carriage of a cargo of wheat from Canada to the Persian Gulf. En route, the vessel was arrested in Singapore and could not perform the voyage. Having faced financial loss the plaintiff terminated the charter party with Cross Ocean Shipping Ltd., and claimed damages on account of breach of contract. As the arrest of first defendant was *ex parte* which was later vacated in the facts and circumstances of the case, once an order of arrest is set aside on the ground that no case is made out that the defendant vessel which was arrested is a sister ship of the vessel in respect of which the claim arose then the action comes to an end and the suit is liable to be dismissed. This is because the court has assumed jurisdiction by an

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1 AIR 2018 (NOC) 431(Bom).

order of arrest granted *ex parte*. It was found to be a failure of jurisdictional test resulting from an erroneous exercise of jurisdiction. It was clear from this judgment that, "the court will vacate the order of arrest. In such a situation, when the order of arrest by which the court assumed jurisdiction is vacated and/or set aside this means that the court is recalling its order exercising jurisdiction. Once this happens the action *in rem* comes to an end."[2] On the basis of abovementioned reasoning, the court further observed in the context of the case, "The order of arrest was recalled and/or vacated not on the ground that the jurisdictional test necessary for the purpose of arrest of a ship was not satisfied. The order of arrest was vacated on the ground that there was no cause of action in contract or in tort against defendant vessel and its owners."[3]

In fine, the court dismissed the case relying on the apex court's rationale laid down in *M.V.Elizabeth* v. *Harwan Investment and Trading (P) Ltd.* [4]

In *Chrisomar Corporation* v. *MJR Steels Private Limited*,[5] the Supreme Court was dealing with several interesting questions arising in admiralty law. The legal regime in India regarding the sea-going ships has been explained in detail in *Chrisomar Corporation*.[6] The plaintiff appellant instituted a suit praying for arrest of the vessel to enforce maritime claim *in rem*. In the course of the proceedings before the court the following details have been culled out as regards 'Maritime Laws, Admiralty Law/Jurisdiction, Maritime lien. "Admiralty Law of the chartered High Courts of 1774 and 1798 has historically been traced to the Charters of 1774 and 1798 as subsequently extended and clarified by the Letters Patents of 1823, 1862 and 1865 – The Admiralty Courts Acts, 1840 and 1861, and the Colonial Courts of Admiralty Acts, 1890 and 1891 essentially stated what the admiralty law in this country is, and these enactments continue in force as existing laws under article 372 of the Constitution of India.

Following *M.V. Elisabeth*, India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade – Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims – Provisions of these Conventions "supplement" and "complement" our maritime laws and fill up the lacunae in the Maritime Shipping Act, 1995 these conventions include the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels,1924 (called the Hague Rules, and later amended and known as the Hague Visby Rules adopted by the Brussels Protocol of 1968) the United Nations Convention on the Carriage of Goods by Sea,1978 adopting the Hamburg Rules, the International Convention Relating to the Arrest of Sea-going

2 *Id*., para 17.
3 *Id.,* para 22.
4 (1993) 2 SCC 433.
5 (2018) 16 SCC 117.
6 *Ibid.*

Ships, Brussels 1952, the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, Brussels, 1952, the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages,Brussels,1926 and the Revised Convention on Maritime Liens and Mortgages,Brussels,1967.

In India, the Admiralty Law of the Chartered High Courts has historically been traced to the Charters of 1774 and 1798 as subsequently extended and clarified by the Letters Patents of 1823, 1862 and 1865. The Admiralty Courts Acts, 1840 and 1861, and the Colonial Courts of Admiralty Acts, 1890 and 1891 essentially stated what the admiralty law in this country is, and these enactments continue in force as existing laws under article 372 of the Constitution.

Though Indian statutes lag behind international law in this context, the principles in international convention derived from the common law of nations, will be treated as a part of the common law of India. These conventions include the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels,1924(called the Hague Rules, and later amended and known as the Hague Visby Rules adopted by the Brussels Protocol of 1968) the United Nations Convention on the Carriage of Goods by Sea,1978 adopting the Hamburg Rules, the International Convention Relating to the Arrest of Sea-going Ships, Brussels,1952, the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision,Brussels,1952, the International Convention for the Unification of Certain Rules of Law relating to Penal Jurisdiction in Matters of Collision, Brussels,1952, the International Conventions for the Unifications of Certain Rules of Law relating to Maritime Liens and Mortgages, Brussels,1926 and the Revised Convention on Maritime Liens and Mortgages, Brussels, 1967. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.

An admiralty action in the courts of India commences against a vessel to enforce what is called a "maritime claim". How maritime claims are enforced, is that Admiralty Law confers upon the claimant a right *in rem* to proceed against the ship or cargo in addition to a right *in personam* to proceed against the owner. A personal action may be brought against the defendant if he is either present in the country or submits to jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings *in rem* have been instituted, he submits himself to jurisdiction.

An action *in rem* is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff *in personam*. It

is, however, imperative in an action *in rem* that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the action but everybody in the world who might dispute the plaintiff's claim.

It is by means of an action *in rem* that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name, but the owner or anyone interested in the proceedings may appear and defend. The writ is issued to "owners and parties interested in the property proceeded against." The arrest of the ship is regarded as a mere procedure to obtained security to satisfy judgment.

A successful plaintiff in an action *in rem* has a right to recover damages against the property of the defendant. The liability of the ship owner is not limited to the value of the *res* primarily proceeded against. An action though originally commenced *in rem*, becomes a personal action against a defendant upon appearance, and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability. The foundation of such an action *in rem* in admiralty law, which is a peculiarity of the Anglo-American law, arises from a maritime lien or a maritime claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action *in personam* is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in an action *in rem* is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the *res* or the bail provided.

No Indian statute defines a maritime claim, but the Indian Supreme Court followed the provisions of the Supreme Court Act, 1981 of England where maritime claims have been listed on the basis of Brussels Convention of 1952 on the arrest of sea-going ships. Even though India is not a signatory to the said Brussels Convention, but the Supreme Court held that the provisions of these conventions should be regarded as part of international common law and these provisions "supplement" and "complement" our maritime laws and fill up the lacunae in the Merchant Shipping Act, 1958. A long list of maritime claims is given in Article I of the said Brussels Convention of 1952. Suffice it to say that article 1(k) states that important materials wherever supplied to a ship for her operation or maintenance would fall within the definition of a "maritime claim". A maritime lien, on the other hand, attaches to the property of the vessel whenever the cause of action arises and travels with the vessel and subsists whenever and wherever the action may be commenced.

There are two attributes to maritime lien: (i) a right to a part of the property in the res and (ii) a privileged claim upon a ship, aircraft or other maritime property in respect of services rendered to, or injury caused by that property. Maritime lien thus attaches to the property in the event the cause of action arises and remains attached. It is, however, inchoate and very little positive in value unless it is enforced by an action. It is a right which springs from general maritime law and is based on the concept as if the ship itself has caused the harm, loss or damage to others or to their property and thus must itself make good that loss.

Maritime lien can be said to exist or restricted to in the event of : (i) damage done by a ship; (ii) salvage ; (iii) seamen's and Master's wages; (iv) Master's disbursement and (v) bottomry ; and in the event a maritime lien exists in the aforesaid five circumstances, a right *in rem* is said to exist. Otherwise, a right *in personam* exists for any claim that may arise out of a contract. The supply of necessaries to a vessel does not create a maritime lien. All cases of maritime lien are based on maritime claims but all maritime claims do not give rise to a maritime lien on the ship. Normally a lien in the general law is a rather limited right over someone else's property. It is a right to retain possession of that property usually to receive a claim. But a maritime lien differs from other liens in one very important respect. Liens generally require possession of the "*res"* before they can come into effect. But a maritime lien does not require prior possession for its creation. In a fit and proper case a claimant on the strength of his maritime lien can secure the arrest of a ship which then comes under the possession of the court and she cannot be moved without the court's order.

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In our country at least claims for necessaries, though maritime claims, do not raise a maritime lien.

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The International Convention on the Arrest of Ships, 1999 in which India participated states as follows:

"3. Exercise of right of arrest – (1) Arrest is permissible of any ship in respect of which a maritime claim is asserted if :

(d) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or (b) – (e)

X X

X

(3) Notwithstanding the provisions of clauses (1) and (2) of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship."

X X

X

India is not a signatory to the International Convention on the Arrest of Ships, 1999, yet as held by the Supreme Court in *M.V. Elisabeth*, the principles incorporated in the convention are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims. Thus, this Convention becomes part of our national law. Article 3(1)(a) of the 1999 Convention

is in two parts. First, arrest is only permissible of any ship if a maritime claim is asserted against the person who owned the ship at a time when the maritime claim arose for which the owner is liable, and second, that the same shipowner should be the owner of the ship when the arrest is effected. Thus, Article 3(1)(a) sets the controversy at rest because a maritime claim can be asserted only at the time the arrest is effected and not at the time of the institution of the suit. This being so, reliance on English judgments to the contrary cited by the respondents, cannot be made as these judgments were rendered prior to the 1999 Convention and it is this Convention that must be followed. It is, therefore, clear that the relevant date on which ownership of the vessel is to be determined is the date of arrest and not the date of institution of the suit.[7]"

The facts in the case are: The appellant-plaintiff a company duly established and operating under the laws of Liberia entered into an agreement with 'Third Element Enterprises Ltd. – a company operating under the laws of Cyprus, who is the ship owner. The Liberian company delivered to the vessel M.V.Nikolaus a certain quantity of bunkers. The owners have failed to pay the amount being the price of the bunkers supplied by the petitioner – the Liberian company. Consequently the ship was arrested. However, as the petitioner submitted that an out of court settlement has been reached between the parties and the petitioner was not inclined to proceed with the matter any further. As nothing happened thereafter the vessel was rearrested, for nonpayment of dues to the petitioner. It is this re-arrest which is the bone of contention between the parties in the apex court, in the instant case. The court after delving into deep analysis of the principles of Admiralty law, as discussed earlier, set aside the judgment of the high court and restored the decree of the trial court, and allowed the appeal.

In *Sunil B.Naik* v. *Geowave Commander,*[8] in the context of arrest of ship the Supreme Court was considering applicability of International Convention on Arrest of Ships, 1999 to maritime claims, in India. One, 'Reflect Geophysical', the owners of the respondent ship, and the appellants (Sunil B. Naik and Yusuf Abdul Gani) who entered into contracts with reflect geophysical to provide assistance in the operation of the task for which the ship was engaged. The first question that was raised is 'whether a maritime claim could be maintained under the admiralty jurisdiction of the high court for an action *in rem* against the respondent ship in respect of the dues of the appellants.

The Supreme Court in *M.V.Elisabeth,*[9] had an opportunity to discuss the scope of exercise of the admiralty jurisdiction and consequently of an action *in rem*. It was observed therein: [10]

> The law of admiralty, or maritime law ..(is the) corpus of rules,concepts and legal practices governing….the business of carrying goods and passengers by water." The vital significance and the distinguishing

7 *Id.,* para 118-124.

8 (2018) 5 SCC 505.

9 AIR 1993 SC 1014; 1993 Supp(2) SCC 433.

10 *Id.*, 1993 Supp(2) SCC 433 at para 44.

> feature of an admiralty action *in rem* is that this jurisdiction can be assumed by the coastal authorities in respect of any maritime claim by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or the place of business or domicile or residence of its owners or the place where the cause of action arose wholly or in part. ' In admiralty the vessel has a juridical personality, an almost corporate capacity having not only rights but liabilities (sometimes distinct from those of the owner) which may be enforced by process and decree against the vessel, binding upon all interested in her and conclusive upon the world for admiralty in appropriate cases administers remedies *in personam* i.e. against the party personally….

The apex court observed that: [11]

> …in the interest of international comity though India is not a signatory to the Convention of 1999, the principles of the same are utilized and applied to appropriate situations to determine a maritime claim "as understood in the international context.

Admiralty law confers upon the claimant a right *in rem* to proceed against the ship or cargo as distinguished from a right *in personam* to proceed against the owner. The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 was passed by Parliament and received the assent of the President of India on August 9, 2017 and was duly published in the gazette. The Statement of Object and Reasons of this Act refers to the desirability of the codifying and clarifying the admiralty law in view of the observations in *M.V.Elisabeth*.

The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, (22 of 2017) came into action in the case of *Quick Time General Trading LLC* v. *Owners and P.I. In the vessel M.T. Aquarius*[12] before the High Court of Calcutta. Briefly, the facts are: The plaintiff filed the admiralty suit claiming a decree for a certain sum (INR 28,06,31,328) and arrest of the defendant vessel. The plaintiff contends that his claim come under section 4(1)(f) and (g) of the Act of 2017. As the plaintiff had suppressed material facts from the court and for this reason, the court dismissed his case. Accordingly the order of arrest stood vacated.

III CONTRACTS

Assobhai Bhanji v. *Great Circle Shipping Pvt. Ltd. Mumbai*[13] is a simple case of contract of carriage. The plaintiff, a registered partnership firm, which is engaged in import and export of dairy and agro products. Defendant is a registered multimodal transport operator. One Agrizala Co (Pte) Ltd., Singapore had entered into a contract with plaintiff for supply of Indian white crystal sugar. The goods were taken delivery by Agrizala Co. without the plaintiff being paid for the value of the cargo and without surrender of the bills of lading. Hence the present suit by the plaintiff. It is the case of

11 (2018) 5 SCC 505 at 527.

12 AIR 2018 Cal 345.

13 AIR 2018 (NOC) 402 (Bom).

the plaintiff that the bill of lading issued by the defendant were documents of title which were required to be produced or surrendered to obtain delivery at Colombo. According to plaintiff, the defendant having delivered the goods without surrender of bills of lading, is guilty of conversion and breach of contract of carriage. The cause of action in the present case is for breach of contract of carriage. In the facts and circumstances of the case, none of the issues where onus has been on defendant has been proved because defendant has not led any evidence. The court therefore decreed plaintiff's suit.

In *L Patel Extractions Private Ltd.* v. *Geni Herbs Inc.,*[14] the plaintiff instituted a suit for a decree of principal amount of USD 192000 alongwith interest involving the goods supplied to the defendants. The suit was filed at Commercial Court, at Vadodara. The defendant contended that in view of the jurisdiction clause in the agreement between the parties, particularly in the purchase order, only the court at Indianapolis, Indiana, US would have jurisdiction and therefore, the commercial court at Vadodara would not have jurisdiction. Consequently the plaint was returned to present it before the court of competent jurisdiction. In the present appeal the court examined the exclusive jurisdiction clause in the purchase order which is the offer in the contract. It is the case of the defendant that the purchase order, properly signed is the only form that is recognized by the purchaser as authority for charging goods or services to its account and it is understood and agreed that there is no understanding or agreement between the purchaser and seller other than the conditions stated in the purchase order. It was further submitted that the terms and conditions mentioned in the purchase order only shall prevail and shall be binding between the purchaser and seller. The following is the text of the contract:[15]

Contract :

> This form when properly signed is the only form that will be recognized by the purchaser as authority for charging goods or services to its account and it is understood and agreed that there is no oral understanding or agreement between purchaser and seller other than the condition stated in this order, or any subsequent change notices. This form supersedes all previous communications and negotiations and constitutes the entire agreement between the parties. No qualifying terms stated by the seller in accepting or acknowledging this order shall be binding upon the purchaser unless accepted in writing by the purchaser.
>
> The seller guarantees that the merchandise furnished hereunder will not infringe any valid patent or trademark. The sellers at it's own expense must defend any and all actions, suits or claims alleging such infringement and will defend, indemnify and save harmless the purchaser, its customers and for those that it may account as agent in

14 AIR 2018 Guj 122.

15 *Id*., para 5.1.

the purchase of the said merchandise, as to both damages and costs in case of any such infringement or alleged infringement.

Seller shall be responsible for testing product using Good Laboratory Practices (GI Ps) and acceptable methodology as determined by industry standards and for maintaining commercially acceptable control standards for all manufacturing, packaging and storage related to the product it delivers to the purchaser. Unless purchaser is at fault, including failure to take reasonably prudent steps or other steps reasonably suggested by seller to protect the delivered product, seller shall be responsible for and compensate purchaser for any and all direct and consequential costs and any expenses incurred including attorney fees for any recall, and when necessary, for replacement of product for failing to meet commercially acceptable standards.

Seller warrants to purchase that it complies with all US Food and Drugs regulations in its manufacturing, packaging and delivery of product to purchase. Seller guarantees that each shipment or other delivery of product to purchaser which was manufactured and packaged by Federal Food, Drugs and Cosmetic Act, 1906 (the Act) and will not be an article which may not, under the provisions of sections 404,505 and 512 of the Act, be introduced into interests commerce.

Seller shall furnish copies of all relevant materials pertaining to any item listed above including but not limited to, documentation to establish current good manufacturing practice (eGMP) compliance, certificate of analysis, Material Safety Data Sheet (MSDS) methods and method validation studies for.

Seller further warrant that the product will provide potencies specified for a period of not less than stated in seller's original certificate of analysis. Seller agrees to promptly notify purchaser of any problem, anomaly defect or condition which would reasonably cause purchaser concern relative to stability, reliability form, fit, unction or quality of the product. Seller warrants that the product shall be free from defects in material and worksmanship for the reasonable self-life of the product.

Acceptance :

It is understood and agreed that any work done or delivery made in accordance with this order constitutes an acceptance of the foregoing conditions. This sale is entered into and performed in the State of Indiana and shall be construed and interpreted in accordance with the laws of the State of Indiana. Any dispute arising under this sale or transaction shall be litigated exclusively in Indianapolis, Indiana and the parties hereby submit to jurisdiction in Indiana and waive any rights to challenge venue based on forum non-conveniens or motion to transfer.

The court, on the basis of the contract as quoted above and the rival contentions observed: [16]

Once it is found that as agreed between the parties only the Indiana Court would have exclusive jurisdiction in that case other courts would not have any jurisdiction and therefore, the court is justified returning the plaint to present it before the court having jurisdiction,as agreed between the parties.

Accordingly the court dismissed the appeal.

IV FAMILY LAW

Marriage and divorce

Validity of marriage certificate

The case *Lakshmi v. State of Kerala*[17] involving the validity of marriage certificates and registratiom of a marriage between a Hindu and a Christian, by local authorities (like – 'Mishra Vivaha Samithy', 'Kerala Registration of Marriages (common) Rules, 2008, 'Registrar of Marriages, Thiruvananthapuram Corporation', District Marriage Registrar(General) and 'Deputy Director'). The parties were married according to the marriage ceremony conducted by the organization 'Mishra Vivaha Samithy' followed by securing the marriage certificates and registrations as mentioned above. Soon thereafter the petitioner submitted an application for cancellation on the ground the parties belong to different faiths and that no customary marriage either under the Hindu Marriage Act, 1955 or under the Indian Christian Marriage Act or under the Special Marriage Act had taken place between the parties, and therefore the certificates issued by the authorities are arbitrary and illegal. The respondent-husband filed a counter affidavit stating that he belongs to Christianity and that there is no valid marriage between the petitioner and himself as no valid marriage was solemnized between them.

After evaluating the entire pros and cons, and facts and circumstances of the issue the court held:[18]

> …the Registrar has registered the marriage on being prima facie satisfied that a marriage was solemnized by and between the parties on the basis of the application submitted and certificate issued by the organization which conducted the inter-caste marriage….(e)ven if there is any illegality in the solemnization of the marriage, it cannot be adjudicated by the Registrar, invoking the powers conferred under Rules….But such marriages can only be annulled by a competent court in accordance with law. Therefore, I do not find any arbitrariness, illegality or other legal infirmities justifying interference in the order passed.

This case concerns with inter-religious marriage. While registration is only a formality under Hindu law, it is not so under Christian law. The issue refers only to the cancellation of registration of marriage and not validity. The court's ruling for a

16 *Id.,* para 5.6.

17 AIR 2018 Ker 162.

18 *Id.,* para 18.

court of law decision in the matter clearly establishes the validity of the marriage between the parties. It is also true that the registration of marriages in India is yet to become mandatory which alone will provide appropriate status of an essential condition for a valid marriage.

Anti-suit injunction in matrimonial matter

The Supreme Court in *Dinesh Singh Thakur* v. *Sonal Thakur*[19] was considering the question regarding anti-suit injunction in a matrimonial matter. The facts relating to the issue are, the appellant-husband who was working in US married the respondent according to Hindu rites and settled in US. Both parties became US citizens. Two children were born out of this wedlock. The parties obtained "PIO" status (Person of Indian Origin) and also"OCI" status (Overseas Citizens of India). The appellant-husband filed a divorce petition against the respondent-wife in Family Court, in Gurgaon, India. Respondent-wife on her part, filed a petition subsequently in Florida in US for divorce on the ground of irretrievable breakdown of marriage. The appellant -husband, thereafter, filed a civil suit in Gurgaon, District Court seeking a permanent injunction and declaration to restrain the respondent-wife from pursuing her divorce petition before the court in US. The Gurgaon Court granted *ex parte* ad interim injunction to the appellant-husband. The respondent-wife approached the Indian court with a petition for vacating the injunction which was granted. The appellant-husband confronted respondent-wife's order vacating the injunction preferring a petition in the high court which was dismissed. The appellant-husband, aggrieved by dismissal has filed this appeal before the apex court.

The Supreme Court in this case is considering the issue, whether under the facts and circumstances of the case, the appellant is entitled to the decree of anti-suit injunction against respondent-wife.

The Supreme Court, after listening to the rival contentions initially observed as regards the doctrine of anti-suit injunctions thus: [20]

> Anti-Suit Injunctions are meant to restrain a party to a suit/proceeding from instituting or prosecuting a case in another court, including a foreign court. Simply put, an anti-suit injunction is a judicial order restraining one party from prosecuting a case in another court outside its jurisdiction. The principles governing grant of injunction are common to that of granting anti-suit injunction. The cases of injunction are basically governed by the doctrine of equity.
>
> It is a well-settled law that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. However, before passing the order of anti-suit injunction, courts should be very cautious and careful, and it should be granted sparingly and not as a matter of routine as such orders involve a court impinging on the jurisdiction of another court, which is not

19 AIR 2018 SC 2094.

20 *Id*., paras 9-10.

> entertained very easily specially when it restrains the parties from instituting or continuing a case in a foreign court.

The apex court considered its ruling in *Modi Entertainment Networks* v. *WSG Cricket Pte. Ltd*.[21] wherein it laid down certain principles as regards anti-suit injunction and pointed out that, "the courts in India like Court in England are courts of law and equity. The principles governing the grant of anti-suit injunction being essentially an equitable relief; the courts in India have the powers to issue anti-suit injunction to a party over whom it has personal jurisdiction in an appropriate case; this is because the courts of equity exercise jurisdiction *in personam*; This power has to be exercised sparingly where such an injunction is sought and if not granted, it would amount to the defeat of ends of justice and injustice would be perpetuated.[22]" The court observed on the facts and circumstances of the case where it had opportunity to peruse various documents such as 'Pan Card, Aadhar Card of the respondent wife including lease deed executed by her – all of which were sufficient to indicate that the wife was ordinarily living in India. The court also found that the respondent wife has admitted that the Family Court in Gurgaon has jurisdiction in the given case and that the evidence placed on record was sufficient enough to show that she was amenable to the personal jurisdiction of Gurugram Family Court. After it is established that both the parties are amenable to the jurisdiction of Family Court Gurgaon, the court also found that both the parties are amenable to court inasmuch as both are permanent US citizens.

The next issue considered by the court is as regards the governing law of their parties' marriage dispute. The apex court looked into in particular its decision in *Y.Narasimha Rao* v. *Y.Venkatalakshmi*[23] and held parties in the present case are continued to be governed by the law governing Hindus in India in the matter of dispute between them. According to the court "foreign court cannot be presumed to be exercising its jurisdiction wrongly even after the appellant being able to prove that the parties in the present case are continued to be governed by the law governing Hindus in India in the matter of dispute between them.[24]" The court also opined that the proceedings in the foreign court cannot be said to be oppressive or vexatious. Finally the confirmed decision rendered by the high court and dismissed the appeal before the apex court.

Mohd Hasan v. *Kaneez Fatima*[25] raises the issue of applicable law in matters concerning inter-religious marriages. Briefly the facts are that the parties, husband and wife both belong to the Muslim community. In a matrimonial dispute between them, the petitioner / plaintiff filed a civil suit for restitution of conjugal rights against the respondent's application for grant of maintenance pendent like and also for legal expenses under section 24 of the Hindu Marriage Act, 1955. An order of maintenance was passed by the trial court. The petitioner in the instant case contends that the

21 2003 (4) SCC 341.

22 *Id*., at para 14.

23 (1991) 3 SCC 451.

24 AIR 2018 SC 2094, para 20.

25 AIR 2018 M.P at 262.

parties being governed by Muslim Personal Law, Hindu Marriage Act, 1955 is not applicable. In the context the court observed, "In the present case, as the parties are Muslim, therefore, provisions of Hindu Marriage Act would not be applicable".[26]

The court accordingly, ruled that the trial court has exceeded his jurisdiction in quoting the maintenance to the respondent under the proceedings initiated by the applicant for restitution of conjugal rights as per Mohammedan law, and allowed the petition.[27]

Recognition of foreign divorce decree

In *Vishal Nitinkumar Kondhia* v. *Jahnvi Vishal Kondhia*[28] a divorce decree from Dubai needed recognition in India – Briefly, the related facts are : The parties are Hindus by religion and are governed by the provisions of the Hindu Marriage Act, 1955. However , the marriage was solemnized and registered under the provisions of Special Marriage Act, 1954 in 1999 at Bombay. Two children were born out of this wedlock. When disputes arose, the wife returned to Mumbai and filed a matrimonial petition in Mumbai Family Court seeking dissolution of marriage. After the wife's return to Mumbai, the petitioner-husband has obtained a divorce decree in Dubai. The High Court of Bombay made a single reference to the apex court's decision in *Narasimha Rao* v. *Venkata Lakshmi's*[29] case, in approval of the Dubai Court's divorce decree, and allowed the matrimonial proceedings initiated by the wife, in the Family Court, in Mumbai.

Succession

A conflict between a French rule and Hindu law as regards succession to family property arose in *Theiry Santhanamal* v. *Viswanathan*[30] before the apex court. Briefly the facts leading to the issue referred to above are, A partition deed was entered into between the father and the sons. Later on, a suit was instituted by the father to nullify the said partition deed. While the suit was pending the father sold the said property. The suit was decreed in favour of the father nullifying the partition. On appeal the division bench of the high court revised the order and held the partition deed as invalid. The high court ruled that since the father and sons who are Christians were governed by French Civil Law and as per the French Civil Code, customary Hindu law was applicable and sons could not seek partition in the property of their father. As against this ruling the present appeal was made to the apex court. The Supreme Court observed recalling the rationale of the division bench of the high court in the context of the case on the hand thus: [31]

The high court noted that the family of Oubegaranadin, and his children *i.e.,* respondent nos. 3 to 5, belong to Christianity in religion. The high court further noted that by Regulation dated January 6, 1817, the French Code to the exception of the

26 *Id* at 263.

27 I*d* at 264.

28 2018(3) MhLJ 823; AIR 2018(NOC) 400 (Bom).

29 (1991) 3 SCC 451.

30 AIR 2018 SC 556.

31 *Id.,* paras 18, 19.

Code of Criminal Procedure, containing the totality of the substantive and objective laws of France, including the personal law, have been made applicable to Puducherry. According to section 3 of the said regulation, Indians, whether Hindus, Muslims or Christians would continue to be governed by usage and customs of their respective castes. In that way, French law has become the law of the land though in matter of personal law it was applicable only to settlers and their descendants. The Regulation dated April 25, 1880 made the provisions of Code of Civil Procedure, 1908 (CPC) relating to civil status, namely, the declaration of births and deaths of marriage applicable to Puducherry territory, but a saving clause left it open to Indians to marry as per their customs. The said saving clause did not apply to Christians who were from that time governed by French law in respect of marriage and divorce but in respect of all other matters pertaining to personal law. Christians continue to be governed by the customary Hindu law. The high court also pointed out that though Hindu Succession Act, 1956 was made applicable in Puducherry, insofar as Christians are concerned, they continued to be governed by customary law, inasmuch as, Hindu Succession Act was not applicable to Christians by virtue of section 2(1)(c) thereof which made the Act applicable only to Hindus. Therefore, Christians in Puducherry continued to be governed by customary law, i.e. customary Hindu law that was prevalent in Puducherry as the law of succession. Thus, rights of the parties were to be determined on the basis of the said Hindu customary law. Taking extensive note of this customary Hindu Law in Puducherry, as per various decisions as well as Book on Hindu laws by French writer J. Sanner, the high court has come to the conclusion that during the lifetime of the father, sons cannot ask for partition of the ancestral property or property of the father. It further held that still the father is entitled to distribute or give away his properties to his children. However, according to the high court, it could not be done in the manner it was done in the instant case and partition deed dated March 15, 1971 was not a valid document.

The Supreme Court further observed on the facts of the case that the father (Oubegaranadin) being absolute owner of the suit property the sons do not derive any right in the family property by reason of their birth. The sons rights arise on the demise of the father and not prior thereto.

In relation to the contention as to the application of Hindu Succession Act the Supreme Court pointed out:[32]

> First of all, the argument ignores that Oubegaranadin and his sons are Christian by religion. Therefore , Hindu Succession Act would not govern, even if it has been enforced in the territory of Puducherry in the year 1963….(I)nsofar as Christians are concerned, old customary law continue to apply….It is the Customary Hindu Law which has been applied to decide the case which approach is perfectly justified.

Finally on the issue of the validity of the partition deed and the question of applicable law to the facts of the case the apex court observed that "Even if it is assumed that Oubegaranadin and his sons are governed by the Hindu Succession Act,

32 *Id.*, para 28.

this Act has no applicability to the transaction in question. The said set governs the succession of the property when a Hindu dies intestate. The manner in which his properties would devolve on his successors is laid down in the scheme of the said Act."[33] Here the parties claimed right in the property on the basis of partition deed which was executed by their father during his lifetime. Hence the main issue is as to whether such partition deed could be executed the father in respect of the properties of which he was the absolute owner.

The court also pointed out, "It is to be borne in mind that the properties in question had fallen on the share of Oubegaranadin on the basis of partition deed dated March 23,1959 between Oubegaranadin and his brothers. As on that date French Code governed the field as per which Customary Hindu Law applies…..Therefore, the moot question is as to whether he could give away by entering into a partition deed like the one he executed on March 15, 1971? Even if French Code is not applied, the aforesaid question cannot be answered with reference to the provisions of the Hindu Succession Act. Partition Deed can be entered into between the parties who are joint owners of the property. In case the father….wanted to give property to his sons, of which he was absolute owner, it could be done by will or by means of gift deed/donation etc."[34]

The Supreme Court dismissed the present appeal agreeing with the conclusions arrived at by the high court as regards the invalidity of the partition deed.

In *Joseph Nodier* v. *Jeanette Nodier*[35] the question was as regards law governing devolution of property in former French colony in India, *viz.,* Puducherry, amongst the French nationals. Factually, the respondents claimed that her mother had executed a registered will by which she bequeathed her half share in favour of the respondent. The respondent therefore, is claiming her half share for separate possession through partition. The appellant herein opposing the claim contended that the respondent had relinquished her share on an earlier occasion and that the will is not true and valid. The respondent justified her claim on the reasoning that partition was sought by her as a legatee of her mother and not as a heir of her father. The other plea as regards the truth and genuineness of the will the court ruled that the will is genuine.

Having lost the case on appeal the appellant has filed the current review application before the high court. The applicant herein – the defendant in the suit primarily contended that the parties in the suit were not Indian Citizens, but they were actually French nationals and the children also continued to be the French nationals. It was also claimed that the mother of the respondent herein had given a declaration at Karaikal to the French Government styled as a "Declaration Adoption Deed Nationalite" and in view of which, it is the French Law of Succession that could be applicable to them. It was further argued that by article 913 of the French Code Civil, the mother could not have disposed of the entirety of the property by way of a will, ignoring the rights of son who has a right to the *legitim*. The court is of opinion that

33 *Id.,* para 29.

34 *Id.,* para 30.

35 (NOC) 884 (Mad); (2018)5MLJ 419

the review petition has raised an important question of law relating to the right of a person to dispose of property by way of will based on the theory of legitim enunciated under Article 913 of the Code Civil. Observing in this context the court said," The right of *legitim*, which is described as a right of legitimate expectation by the immediate heirs. The *legitim i*s a portion of the estate, which a person cannot dispose of by an act of liberality, if he has heirs in direct line, who are called forced heirs. The existence of the right is almost settled now. This right or principle of *legitim* is equivated to the restriction placed on a Hindu father, while dealing with the ancestral properties under Hindu law.

The French Code Civil prescribes in the quantum of the disposable quota also. David Annoussamy in his Book on French legal system, while explaining as to how the doctrine of *legitim* operates observes as follows: "C-Effect of Reduction: When a liberality is found to be in excess of the disposable quota it does not become null and void. The action instituted by the protected heir has only the effect of reducing the liberality to the extent necessary to satisfy the legitim of that heir. In case of a bequest, the heir would get out of the bequest what is needed to make good the legitim, and the bequest would be operative for the balance, if any. Regarding donations the right of action available to the protected heir does not give him a share in each of the movables and immovables donated necessitating a partition. The donations will get cancelled in the order indicated above and to the extent necessary to meet the legitim irrespective of the nature of properties (movable or immovable) donated. Even disguised donations are not null and void; they are only subject to reduction like the other donations."

Article 921 of the Code Civil provides that the liberalities could be challenged by only those heirs for whose benefit a law has reserved a portion of the property. The law relating to the right to challenge the liberalities of the ancestors has been dealt with by David Annoussamy, in his Article titled "About the Right of Legitim among Hindus in Pondicherry" published in the Journal of the Indian Law Institute in 1978. The learned Author while dealing with the beneficiaries in the said article has observed as follows:

> Scope of the Legitim The Beneficiaries "The question of legitim arose first in respect of sons as regards the properties of their father. As it was found that they had a close interest in those properties and that they had the obligation to continue the family, they have been consistently considered as forced heirs. The illegitimate son was also held to be a forced heir in *Codiresa Mudaliar* v. *V. Ekambaram*. The question whether a daughter, who in the absence of a son was considered to be the heir of her father, was a forced heir as well arose in *Amurdalingam* v.*Vijaya Saradamballe*. The Court recognized to such a daughter the right to attack the will of her father disposing of the totality of his patrimony by holding that the daughters in the absence of sons were entitled to a share which could be called as legitim and which should be sufficient for their settlement by way of marriage. In this decision there is some confusion between the right to settlement and the right of legitim. But the right of legitim of daughters on the

> properties of the mother was recognized in the following unreported decisions- *Kannussamy* v. *Sornathammalle,Moutloukichenapillai* v. *Govindassamy, Djealatchoumiammalle* v. *Madouramballe*."

The author further observes: [36]

> ... One can, therefore, safely draw the conclusion that the two points are well settled, i.e., the sons have a right of legitim in the property of their father and the daughters have the same right in the property of their mother."
>
> The above passage would go to show that the right of *legitim* is confined to the sons in their father's estate and the daughters in their mother's estate. Therefore, a son will not be considered to be a forced heir of the mother and a daughter will not be considered to be a forced heir of the father.

The court dismissed the review petition holding French law of devolution governed parties who are French nationals.

Succession of property to Indian Christians

Succession to property of Indian Christians is governed by Indian Succession Act, 1925. This Act does not bar the succession of property of any Indian Christian by a person who is not an Indian national. There is no prohibition for succession of the property in India by a foreign national by inheritance. This was established firmly by the apex court in *B C Singh* v. *J.M. Utarid.* [37]

Factually, the suit property, immovable property was jointly purchased by the original plaintiff, B C Singh and his wife S.L. Singh. Each of them held equal shares in the entire property. The first defendant, being the kindred of the deceased, S.L.Singh and has become the co-owner after her death. In the instant case, the intestate, *viz.,* S.L.Singh, left behind her husband and kindred B.C.Singh who has half-share in the property by virtue of the sale deed dated February 11, 952, being the husband of S.L.Singh would succeed half the share in the property held by her under the provisions of the 1925 Act. In all, B.C.Singh would hold 3/4th in the entire property. The issue before the court is what should happen to the remaining 1/4th share in the property ? It was contended on behalf of the respondent-defendants that Ida Utarid who is related to the intestate (S.L.Singh) could not succeed to her share as she is a Pakistani national. S.L.Singh dies without leaving any issue. It is not disputed that Ida Utarid is the real sister of S.L.Singh, who is an Indian Christian, governed by the Indian Succession Act, 1925. It was admitted that this Act does not bar the succession of the property left by her. This Act does not bar the succession of property of any Indian Christian by a person who is not an Indian national. It was also pointed out that there is no prohibition for succession of the property in India by a foreign national by inheritance. On facts and circumstances of the case, the apex court held, "In the instant case, S.L.Singh has left behind her sister, Ida Utarid. She has not left behind any lineal

36 *Id*., paras 8,9,10 and 11.

37 (2018) 16 SCC 585.

descendant. Ida Utarid was the only near kindred and preferential heir of the intestate and she would have succeeded to 1/4th share in the property".[38] The court further observed, "It is clear from the scheme of the Act that when intestate has not left behind any lineal descendant and has only kindred, the nearest kindred excludes the distant kindred. The first defendant being a distant kindred is not entitled to succeed any share in the property since the intestate has left behind her real sister."[39]

High Court of Madras was concerned with succession issue in French settlements after their merger with Indian Union in *Gowri* v. *Subbu Mudaliar.*[40] Several laws prevailing in Indian Union were extended to merged territory of Pondicherry to have both administration and legal control. One such enactment that was extended to Pondicherry is Succession Act of 1956 with effect from 1963 which only applies to Hindus residing in Pondicherry. However by section 2(2A) of Hindu Succession Act, this Act was not applicable to the reconcants of Union Territory of Pondicherry. The personal laws of reconcants were to be governed by custom and practice, which were vague therein before the extension of Hindu Succession Act, 1956. The said exemption was accorded reconcants and other Hindus who were natives of Pondicherry are governed by the Hindu Succession Act, 1956 in entirety.

The court pointed out in this context, "the Christians were governed by the customary Hindu law even after the application of the Hindu Succession Act, 1956 to Pondicherry, they still continue to be governed by the customary law."[41] According to the court, customary law was applied to the Christians 'since Hindu Succession Act which was made applicable in the year 1963 only to the Hindus and not to Christians.'[42] The court further observed , after an elaborate study and narration of the developments of personal laws in former French settlements in the Indian Union – "Thus, it is clear that except the special category of people residing in the Union Territory of Pondicherry called Reconcants, all other Hindus of Pondicherry territory are governed by the provisions of the Hindu Succession Act,1956 Hindu Marriage Act 1955, the Hindu Adoption and Maintenance Act,1956 *etc.* Thus, even as on date, only to the French nationals residing in the Union Territory of Pondicherry and to the Reconcants, who can be found in all religions and castes are governed by the French Code Civil and established customs followed in their community as the case may be, in matters relating to marriage, divorce, adoption, guardianship etc. citizenship of people in the Territory of Pondicherry after merger.[43]"

This case raises the question of applicable law to matters of inheritance, particularly in former French settlements after the merger in the Indian Union. After a thorough analysis and study of the developments in Pondicherry, the court observed: "…In view of Section 4 of the Hindu Succession Act, which is overriding effect of all the customs Hindu Succession Act alone would apply to the Hindus residing in the

38 *Id* at 590.

39 *Ibid*

40 AIR 2018 (NOC) 301(Mad); (2017) 5 MLJ 18.

41 *Id*., para 21.

42 *Ibid.*

Union Territory of Pondicherry, except reconcants who renounced their personal status and adopted French Law."[44]

Child custody

This years survey records seven decisions on child custody matters resulting from broken homes. Of these four are from the apex court while three are from the state high courts, namely, Bombay and Delhi. The cases are : *Sony Gerry* v. *Gerry Douglas*;[45] *Jasmeet Kaur* v. *Navtej Singh;*[46] *Kanika Goel* v. *State (NCT of Delhi);*[47]*Meena Bhargava* v. *Naveen Sharma;*[48] *Shehzad Hemani* v. *Nadia Rashid;*[49] *Dirshan Vanmali Patel* v. *State (NCT of Delhi)*[50]and *Chandan Mishra* v. *Union of India.*[51] All these cases concern the issue of child custody and share the welfare principle of the child.

In *Sony Gerry* v. *Gerry Douglas*[52] the parents had agreed to a settlement between them as regards childrens' custody. Lower court gave custody to father living in Kuwait and visitation rights to mother staying in Thiruvanthapuram. Mother's claim for custody was rejected by the high court. On appeal the parents agreed for an agreed arrangement on the issue of custody. After its interaction with the children- daughter (18years) and minor son, and in view of the agreement of parents in the matter, the court came to the conclusion to dismiss the petition. The court however, observed as regards its interaction with the daughter, " She has, without any hesitation, clearly stated that she intends to go back to Kuwait to pursue her career…What she has stated before the Court that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay. It needs no special emphasis to state that attaining the age of majority in an individuals life has its own significance. She /He is entitled to make her/his choice. The court cannot, as long as the choice remains, assume the role of *parens patriae*. The daughter is entitled to enjoy her freedom as law permits and the Court should not assume the role of a super guardian….[53]

In *Jasmeet Kaur* v. *Navtej Singh*[54] the Supreme Court considered the basic principles concerning the best interest of the child leaving the decision on the subject matter – custody of the child – to the courts below, where the same matter is pending. The factual details are: The parents are citizens of the United States where they were

43 *Id.,* para 26. The Court relied on Articles written by the then District Judge,Ramesh Chandran, the French writer – Sanner on Hindu, Opinion of Sanner ii his 'Droit Civil Applicable aux Hindus,1916 and Justice David Annousamy on French Legal System.

44 *Id* .,para 36.

45 (2018) 2 SCC 197.

46 (2018) 4 SCC 295

47 (2018) 9 SCC 578.

48 (2018) 15 SCC 23.

49 AIR 2018(NOC) 752 (Bom).

50 AIR 2018(NOC) 891 (Delhi).

51 AIR 2018(NOC) 296 (Delhi); MANU/DE/1312/2018.

52 (2018) 2 SCC 197.

53 *Id.* at 201.

54 (2018) 4 SCC 295.

married and settled. Wife's guardianship case filed in the family court in India was rejected on the ground that parties are nationals of US and the courts in US have intimate contact with the matters of the case. The high court affirmed the order of the family court. On appeal, the apex court analysed the issues concerned such as, jurisdiction, *parens patriae* jurisdiction, principles of conflicts of laws/ prIvate international law including inter-country dispute jurisdiction of Indian courts. The Supreme Court re-emphasized that paramount consideration is the best interest of the child. The court referred to almost all the leading cases in the context. To name a few: *Suryavadanan* v. *the State of TN*;[55] *Ravi Chandran* v. *Union of India*[56] *Dhanwanti Joshi* v. *Madhav Unde;*[57] *Surinder Kaur* v. *Harbax Singh Sandhu*[58]and *Ruchi Majoo* v. *Sanjeev Majoo*.[59] Further clarifying the welfare principle the apex court referred to the judgment in *Nithya Anand Raghavan* v. *The State (NCT of Delhi),*[60] wherein it had observed:[61]

> We must remind ourselves of the settled legal position that the concept of forum convenience has no place in wardship jurisdiction. Further, the efficacy of the principle of comity of courts as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of this Court.

The invocation of first strike principle as a decisive factor , in our opinion, would undermine and whittle down the wholesome principle of the duty of the court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance. If the court is convinced in that regard, the fact that there is already an order passed by a foreign court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration. The interests and welfare of the child are of paramount consideration. The principle of comity of courts as observed in Dhanwanti Joshi case, in relation to non-convention countries is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration. While considering that aspect, the court may reckon the fact that the child was abducted from his or her country of habitual residence but the court's overriding consideration must be the child's welfare

Eventually , in view of the established principles the Supreme Court pointed out that, "principle of comity of courts or principle of forum convenience alone cannot determine the threshold bar of jurisdiction. Paramount consideration is the best interest of the child."[62]

55 (2015) 5 SCC 450.
56 (2010) 1 SCC 174.
57 (1998) 1 SCC 112.
58 (1984) 3 SCC 698.
59 (2011) 6 SCC 479.
60 (2017) PSCC 454.
61 (2018) 4 SCC 295 at 296-297.
62 *Id* at 297.

The court considered and opined as to the basic principles concerning the best interest of the child, leaving the decision as to the subject matter to the courts below where the same is pending.

The Supreme Court was considering primacy of paramount interest of the minor child as well as factors relevant for determination thereof, in *Kanika Goel* v. *The State of Delhi*.[63] In this case, where the custody of the female minor child was with her biological mother, the court was called upon to consider the prayer for return of the minor female child. The minor child, a US citizen by birth, had grown up in US for years before she was brought to India (New Delhi) by her biological mother/ the appellant. Parents were of Indian origin, domiciled in US after marriage. Appellant mother after coming to India with the minor child filed a petition for dissolution of marriage on the ground of cruelty. The father filed a petition for the return of the child in the US, and also a writ petition in high court in India to direct the appellant to produce minor child and return her to the jurisdiction of the court in US. As against the writ petition which ordered the return of the child to US, the appellant approached the apex court by way of special leave petition. The issue before the Supreme Court was whether the permanent interest of the minor child was to return to US.

It is the contention of the father that the US Court has the competent jurisdiction as the child was a natural born citizen of US born to US citizens and was domiciled in US. The child being a habitual resident of US and never resided anywhere else. The appellant mother of the minor child assailed the decision of the high court for having overlooked the rudimentary principles governing the issue in respect of a minor child who was in lawful custody of her mother and misapplied and misconstrued the principles of paramount interest of the minor girl child of tender age of four years. The Supreme Court after an elaborate analysis of the issue observed: [64]

> …the intimate contact of the minor child would be her mother who was her primary caregiver and more so, when she was at the relevant time in the company of her mother. The appellant being the mother, had a fundamental right to look after her minor daughter which cannot be whittled down or trivialized….The welfare and paramount interest of the minor girl child would certainly lean towards the mother, all other things being equal. The role of the mother of a minor girl child cannot be reduced to an appendage of the child and the mother cannot be forced to stay in an unfriendly environment where she had been victim of domestic violence inflicted on her.

The apex court further observed, "the sole consideration in a proceeding such as this, must be to ascertain the welfare of the minor girl child and not to adjudicate upon the rights of the father or the mother."[65] It is the view of the court that the expression 'best interest of the child' is wide in its connotation and cannot be limited only to love and care of the primary caregiver *i.e.,* the mother.[66] In the context of facts

63 (2018) 9 SCC 578.

64 *Id. a*t 595-596.

65 *Id*. at 597.

66 *Id.* at 600-601.

and circumstances of the case expanding the discussion on the best interest of the child the court continued its observation: [67]

Thus all decisions regarding the child should be based on primary consideration that they are in the best interest of the child and to help the child to develop to full potential. When involvement of one of the parents is not shown to be detrimental to the interest of the child, it goes without saying that to develop full potential of the child, it is essential that the child should receive the love, care and attention of both his/her parents and not just one of them, who may have decided on the basis of his/her differences with the other parent, to relocate in a different country development of full potential of the child requires participation of both the parents. The child, who does not receive the love, care and attention of both the parents, is bound to suffer from psychological and emotional trauma, particularly if the child is small and of tender age. The law also recognizes the fact that the primary responsibility of care, nutrition and protection of the child falls primarily on the biological family. The "biological family" certainly cannot mean only one of the two parents, even if that parent happens to be the primary caregiver. The Juvenile Justice Act encourages restoration of the child to be reunited with his family at the earliest, and to be restored to the same socio-economic and cultural status that he was in, before being removed from that environment, unless such restoration or repatriation is not in his best interest.

Explaining the concept of best welfare of the child the court opined: [68]

> Thus, best welfare of the child, normally, would lie in living with both his/her parents in a happy, loving and caring environment, where the parents contribute to the upbringing of the child in all spheres of life, and the child receives emotional, social, physical and material support, to name a few. In a vitiated marriage, unfortunately, there is bound to be impairment of some of the inputs, which are, ideally essential for the best interest of the child. Then the challenge posed before the Court would be to determine and arrive at an arrangement, which offers the best possible solution in the facts and circumstances of a given case, to achieve the best interest of the child.

The court heavily relied and followed its earlier decisions on the same subject in *Nithya Anand Raghavan* and *Prateek Gupta's* cases.[69]

The apex court thereafter referring to the Hague Convention of 1980 observed, "India is not yet a signatory to the Hague Convention of 1980…We are in respectful agreement with the aforementioned exposition".[70] Continuing the practice of the Indian courts on the issue, it was pointed out by the court:[71]

> The consistent view of this court is that if the child has been brought within India the courts in India may conduct a) summary including or

67 *Id.* at 601 the court was quoting the excerpt from the impugnent judgment of the High Court of Delhi in *Karan Goel* v. *State (NCT of Delhi*) (2017) 245 DLTI.

68 *Id.* at 602.

69 (2017) 8 SCC 454 and (2018) 2 SCC 309 respectively.

70 (2018) 9 SCC 578 at 602-603.

71 *Id.* at 603-604.

> (b) an elaborate inquiry on the question of custody. In the case of summary inquiry, the court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child. In other words, even in the matter of summary inquiry, it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre-existing order of return of the child by a foreign court. In an elaborate inquiry the court is obliged to examine the merits as to where the paramount interest and welfare of the child lay and reckon the fact of a pre existing order by a foreign court for return of the child as only one of the circumstances. In either case, the crucial question to be considered by the court (of the country to which the child is removed) is to answer the issue according to the child's welfare. That has to be done bearing in mind the totality of facts and circumstances of each case independently. Even on close scrutiny of the several decisions pressed before us, we do not find any contra… this behalf. To put it differently, the principle of comity of courts can be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court.

In the final analysis the court observed in the light of the facts and circumstances of the case: [72]

> It is thus imperative that unless, the continuance of the child in the country to which it has been removed, is unquestionably harmful, when judged on the touchstone of overall perspectives, perceptions and practicalities, it ought not to be dislodged and extricated from the environment and setting to which it had got adjusted for its wellbeing. …there was no disruption of her education or being subjected to a foreign system of education likely to psychologically disturb her. On the other hand, the minor child M is under the due care of her mother and maternal grandparents and other relatives since her arrival in New Delhi. If she returns to US as per the relief claimed by Respondent 2, she would inevitably be under the care of a nanny as Respondent 2 will be away during the daytime for work and no one else from the family would be there at home to look after her. Placing her under a trained nanny may not be harmful as such but it is certainly avoidable.

72 *Id.* at 608-609.

> For there is a likelihood of the minor child being psychologically disturbed after her separation from her mother, who is the primary caregiver to her. In other words, there is no compelling reason to direct return of the minor child M to the US as prayed by Respondent 2 nor is her stay in the company of her mother, alongwith maternal grandparents and extended family at New Delhi, prejudicial to her in any manner, warranting her return to the US.

The apex court accordingly set aside the impugned judgment of the high court.[73]

In *Meenal Bhargava* v. *Naveen Sharma*[74] there were cross-appeals, filed by both the parties, challenging different parts of order passed by the High Court of Rajasthan. After their marriage parties first lived in US (Baltimore) and later shifted to Canada. Earlier, a son was born at Baltimore. Matrimonial relations became strained later in Canada. The wife left for India with the child. The respondent husband filed a case in a Canadian Court for custody which granted a temporary custody to him. As the appellant wife had reached India with the child the respondent filed a habeas corpus petition in the High Court of Rajasthan. The parties were referred to mediation. The dispute was settled temporarily and the appellant joined the respondent in US alongwith the child. The consent terms were recorded. However the settlement collapsed and both the parties blamed each other for breach of terms.

The high court has by the impugned judgment found the appellant wife to be in contempt awarded punishment. The appellant has challenged the order of the high court. The respondent felt aggrieved as the high court refused to grant him the custody of his son – granted by the Canadian Court. The court, however did not rule on the issue of child custody and left it to the high court to decide in *habeas corpus* petition filed by the respondent (which was revived).

Expressing its anguish at the failure of the mediation efforts, the court observed:[75]

> In these dark clouds enveloping the relationship between the parties, a silver lining emerged in the form of mediation. As both the parties acted with wisdom and maturity, mediation exercise was successful. Both the parties not only buried their acrimony against each other but decided to have a new beginning. The magic of mediation worked at that moment. The consent terms , which were recorded in the settlement arrived at during mediation proceedings brought about the resolution which could truly be leveled as " win win" situation. The accord was aimed at reuniting the two spouses with the aim of bringing happiness in the matrimonial relationship. More importantly, the paramount interest of Pranav as a child was acknowledged by the parties as an child, particularly at this age, needs the company of both the parents for him/her to bloom and for ideal bringing up. In fact, as is clear from the events noted above, both the parties even took initial steps to make

73 *Karan Goel* v. *The State (NCT of Delhi)* (2017) 245 DLTI.

74 (2018) 15 SCC 23.

75 *Id.* at 34.

> their settlement a success. However , before it could be seen as "happy ending" and parties could reach the end of the road where they could find their final destination as envisaged in the settlement, they encountered a road block. Whether it happened due to the fact of the appellant or that of the respondent, we are not commenting about the same. Unfortunate part is that instead of acknowledging the truth, parties are grumbling continuously and complaining against each other. This accusation, castigation, chargeability and dilation, depicting deviation from rectitude is a mindless exercise and in the process, true welfare of Pranav is sought to be sacrificed.

Chandan Misra v. *Union of India*[76] is again another case where the minor child was removed to India from US by the mother. It is a case of domestic violence due to which the respondent mother had to leave her matrimonial home alongwith her minor son to India. In the context the factual details of pleadings and documents on record, the court found, it was the petitioner of the *habeas corpus* for the return of the child, who deserted the respondent mother in India. The respondent was all along interested in returning to the US, but was unable to do so owing to the refusal of the petitioner to provide her with requisite documents to renew her visa. The petitioner all the while, attempted to ensure the return of the minor child to the US and isolate the respondent mother in India. The court found that the petitioner did not act in the best interest of the child and on the other hand, the child was brought up by the mother with the help of her parents who are teachers. The petitioner's claim that the respondent has submitted to the foreign court jurisdiction was rejected as the respondent in her written response merely highlighted her precarious position and sought the assistance of the foreign court to participate in the proceedings. As a result the court in US passed an *ex parte* order. Accordingly, the court observed, "We proceed to analyse where the welfare of the child lies…we have gone through the academic and co-curricular record of the minor child. The records show that good care is being taken of the minor child. Quality education is being provided to the child and the child has adjusted to the lifestyle in India. He has been learning tennis, karate, football and cricket. Thus we are of the opinion that prima facie it appears that the child has developed roots in India."[77]

On the legal perspective, the court faced the first query, principle of 'first strike'. It was contended by the petitioner that the foreign court was the first to pass an order granting interim custody to the petitioner. Secondly it was argued that the foreign court has the most intimate contact with the issues arising in the case. Thirdly the principle of 'comity of courts' which should be factored in by this court and the order of the foreign court should be honoured.

It was contended by the respondent mother that filing her written response from India explaining the situation, she is in without any appearance, can by no means be treated as submission to the jurisdiction of the foreign court. It was also argued on her behalf that the foreign court order was in contravention of section 13 of Civil Procedure

76 AIR 2018 (NOC) 296 (Delhi); 241(2017) DLT 643.

77 MANU/DE/1312/2017 at para 61.

Court, 1908 and is also an *ex parte* order in nature. Further the respondent mother contended that as the order of the foreign court can be enforced only by countries parties to the Hague Convention on abduction and India is not a signatory.

Therefore the foreign court order cannot be enforced in India. Referring to the question of custody of a minor in a situation where "one spouse is armed with an order of the foreign court, the court must consider numerous factors and may not blindly adhere to the order of the foreign court. Besides, the question of jurisdiction, principles such as 'most intimate contact' and the doctrine of 'closest concern' are also considered by the Court. According to the court," these doctrines are components of the modern theory of conflict of laws, inasmuch as a court which has "the most closest concerns and "most intimate contact" with the issues arising in the case may fruitfully exercise its jurisdiction in the case…. In cases where both the parents have initiated proceedings in their respective countries, the principle of 'first strike' comes into the fray provided the jurisdiction of the foreign court is not in doubt. The substantive order which was passed prior in point of time should be given due respect and weight over the subsequent order."[78]

The court after due consideration of the facts and circumstances of the case opined:[79]

> we are of the opinion that prima facie it appears that the child has developed roots in India. To handover the custody of the child, who has spent the past 6 years in the care of the mother to the father to be taken to a foreign land with no familiar face, unfamiliar surroundings ,culture, festivals would do much harm to the child and in our view, would not be in the interest of the welfare of the child. Further to send the child to the land where his mother cannot even enter in the absence of visa, which was denied by the petitioner himself would not only be cruel to the child, but also to the mother. Any contest in a foreign court between the petitioner, who holds a green card (permanent residence permit), secure job and backing of family and friends in addition to being armed with the order of the Foreign Court, on the one hand; and the mother(respondent) without visa, jobs, funds, security and familial support on the other hand would inevitably tilt the scales of justice unfairly on one side placing her on an unequal footing.
>
> The child has been in India for a considerable period of time and was less than 2 years of age when he was brought to India. He has had all his education in India and turned 8 on 28.04.2009. he is well taken care of by the mother, without any support from the petitioner. Thus it is clear that the domestic courts in India would have much closer concern and intimate contact with the minor child and the issues arising than the US courts….It cannot be forgotten that "welfare" is an all-

78 *Id.*, para 49- 50

79 *Id*., paras 61,62, 63, 64.

> encompassing term, it cannot be measured by financial means or superior education alone.

In the light of the above mentioned circumstances the court held that the repatriation of the child is not feasible in the interest of the welfare of the minor child. The court followed the rulings of a series of apex court decisions in coming to the conclusion.

In *Dirshan Vanmali Patel* v. *State (NCT of Delhi*)[80] petitioner a national of South Africa married to an Indian national in India is seeking production of his minor daughter aged 10 months who is in the custody of his wife in India. The child was born in South Africa, a citizen of South Africa while the parents were residing in South Africa. Matrimonial dispute arose between the parties. The respondent mother of the child reached India with the child and initiated proceedings under Hindu Marriage Act, 1955 for divorce and custody of child Act and also under Protection of Women from Domestic Violence Act, 2005 against the petitioner. Petitioner also instituted divorce and custody proceedings in Cape Town, South Africa against the respondent.

The issue before the High Court of Delhi concerned, which of the two courts will decide, "the best interests of the child" – the courts being – Court in South Africa or courts in India (Delhi).

It was argued by the petitioner that as the child was born in Cape Town in South Africa and is primarily a permanent resident of South Africa, it is only the courts in South Africa that can decide best interests of the child, and not a court in India. The court ruled that the High Court at New Delhi alone in a petition under article 226 of the Constitution should decide the issue of 'best interests of the child' by undertaking a summary enquiry as contemplated by the decision of the Supreme Court in *Ravi Chandran* v. *Union of India*[81]and *Nithya Anand Raghavan* v. *The State (NCT of Delhi)*.[82] In *Nithya Anand's* case the Supreme Court ruled that the court irrespective of the order of a foreign court on the issue of custody of the child, it is the high court in India which is approached with a habeas corpus petition which had to decide the question as regards the 'best interests of the child'. Further it was also held in this case, that the "principle of comity of courts" cannot be given primacy or more weightage for deciding the matter of custody or for return of the child. And that "even in the matter of the 'summary enquiry' it is open to the court to decline the relief of return of the child to the country from where he/she was removed irrespective of a pre existing order of return of the child by a foreign court.[83]" The High Court of Delhi further observed: [84]

> It appears that after the decision in *Nithya Anand Raghavan* v. *The State (NCT of Delhi)*, irrespective of whether the child is an ordinary resident of another country and irrespective of whether there are

80 AIR 2018(NOC) 891 (Delhi): (2018) 246 DLT 62 (DB) 311.

81 (2010) 1 SCC 174

82 (2017) SCC OnLine SC 694.

83 As quoted from *Nithya Anand* case by High Court of Delhi in AIR 2018(NOC) 891(Delhi), para 24.

84 *Id.*, para 25.

> proceedings pending in another country and irrespective of whether orders have been passed in those proceedings, it is the court in India which has to perforce decide the 'best interests of the child'.. On these findings the habeas corpus petition of the petitioner was dismissed.

The dispute regarding custody of child in *Shehzad Hemani* v. *Nadia Rashid* [85] is between a couple belonging to Netherlands and India. The father petitioner an Indian citizen and the respondent mother with dual citizenship – being a citizen of Netherlands and also a Pakistani National. After marriage in India according to Islamic rituals, they also registered the marriage under the Special Marriage Act, 1954. A daughter was born out of the wedlock in Netherlands, as such the child became a Dutch national. Parties returned to India and made Mumbai their matrimonial home. With an intention to relocate themselves the mother left for Netherlands alongwith the child, and made it known her intention to not return to India. The respondent mother while in Netherlands initiated proceedings "Quia Timet" application for custody before the Dutch District Court and filed a petition seeking dissolution of marriage before the Dutch High Court. The petitioner also filed a petition before the Hague, District Court alleging abduction and sought return of his daughter under provisions (article 3) of the International Child Abduction Convention 1980. The Dutch Court rejected the petitioner's case. The Dutch District Court on respondent mother's petition ruled that the mother had always cared for their daughter – 'Insiya' who had lived with the mother, since they came to Netherlands from India. Considering her young age the district court held that it is in Insiya's interest that she be placed with mother, Nadia Rashid. The petitioner father abducted the child from Netherlands. The respondent mother moved an application before the District Court, Amsterdam under the Hague Convention of Child Abduction, praying for immediate return of the minor child. The court at Hague ordered immediate return of the minor child to Netherlands, to mother.

Proceedings for child custody were on in the family court which on due consideration of the entire matter, directed return of the minor child to the respondent mother.

The High Court of Bombay was examining the issue of ordinary residence of the minor to determine the issue relating to question of jurisdiction of the court under Guardians and Wards Act, 1890. The court pointed out that "the word 'resides' definitely has a wider amplitude than the mere temporary stay or a casual stay at a particular point in time."[86] The issue before the court involved international perspective and hence the court was applying the principle of 'comity of courts'. It observed: [87]

> …the principle of 'comity of courts' is derived and is deducible from the principle of 'Comity of Nations'. According to the Blacks Law Dictionary, the jurisdictional comity which can be understood as 'comity

85 AIR 2018(NOC) 752 (Bom).

86 *Id.,* para 14.

87 *Id.,* paras 15,16 and 17. The court in this context relied on the Supreme Court decision in *Ravi Chandran* v. *Union of India* (2010) 1 SCC 174; *Ruchi Majoo* v. *Sanjeev Majoo* (2011) 6 SCC 479 ; and *Nithya Anand Raghavan* v. *State (NCT of Delhi)* (2017) 8 SCC 454.

> of courts' as a principle, in accordance with which the courts of one state or jurisdiction will give effect to the laws and decisions of another, not as a matter of obligation, but out of deference and where foreign decrees would get preference while deciding the case. The principle of comity is an important doctrine applied in the interest of maintaining harmonious relations among nations and it is an informal and voluntary recognition by the courts of one jurisdiction of the law and judicial decisions of another…(T)he principle of comity of courts would not superimpose the interest and welfare of a minor,which is the paramount consideration in dealing with the issues of custody of minor child. In such circumstances, the court of competent jurisdiction in the country is duty bound to deal with the matter, independently, in accordance with the law applicable in its country and while doing so, it is expected to take into account any judgment/decree/order passed by a Foreign Court. The Code of Civil Procedure in Section 13 has made it imperative to recognize the decrees and orders passed by the Foreign Courts, though it would not bind the courts in this country, and simply because the Foreign Court has taken a particular view is not an enough reason to deprive the Court in this country from exercising its jurisdiction over the issues, which fall within its territorial limits and this court would be at liberty to decide the said issues.

On facts and circumstances of the case the High Court Bombay of observed:[88]

> It is to be noted that under the Indian law, a removal of a child from the matrimonial home by one of its parents without the consent of another, in the absence of an order of the court, is not an offence. India is not even a signatory to the Hague Convention of Civil Aspects of International Child Abduction (1980)…since procuring the custody of a child by a natural father is not a crime, courts in India are duty bound to decide the issue of custody of the child by invoking the doctrine of *parens patriae.*

In the light of facts and circumstances the court set aside the order passed by the family court and allowed the petition.

V CONFLICT OF LAW ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION[89]

It is common knowledge that international commercial arbitration addresses many questions relating to conflicts of laws. In this part of survey only those judicial decisions which involve conflict of law issues from the Supreme Court and various high courts have been dealt with.

88 *Id.,* para 21.

89 This part is jointly prepared along with Nidhi Gupta, Associate Professor and Executive Director, Centre for Arbitration Law, National Law University, Jodhpur.

Jurisdiction of Indian courts with respect to Foreign Seated Arbitrations

Arbitration laws in India, especially since 2002, has been subject of much criticism and concern. Incorporating UNCITRAL Model law, the 1996 Act was supposed to address many questions relating to conflict of laws and jurisdictions in international commercial arbitration. However, the reality has been too far from the expectations. Jurisprudence in India, especially in relation to foreign seated arbitration has raised more confusions than in solved. An encouraging development has been inclination of the Supreme Court to address these confusions and the set the record straight for the world of commercial arbitrations. The 2012, with the Constitution bench judgement of the Supreme Court in BALCO and 2015 amendment act can be labelled as watershed events in the development of Indian arbitration laws. Post-2012, the effort of judiciary has been to reinforce the principle of territoriality in international commercial arbitration, even if the ghosts of Bhatia International or pre-BALCO are still around to haunt due to prospective application of BALCO. 2018, the year under survey has been no exception, with the Supreme Court and high courts attempting to contain intervention of Indian courts in foreign seated arbitration, even in those cases which continue to be governed by the ratio of Bhatia.

Judgement of the High Court of Delhi in the case of *Focus Energy Limited* v. *Reebok International Ltd.*,[90] is a recent judgement which exemplifies effort of high courts to maintain a pro-arbitration stance. Focus Energy involved a case of challenge under section 34 of the 1996 Act to the partial and final awards dated, November 4, 2010 and May 24, 2011, delivered by London Court of International Arbitration (LCIA), through arbitration proceedings in London. The arbitration was conducted in pursuance of the dispute resolution clause in the contract, which read as follows:

A. Subject to the provision of section 11(B) below, the parties agree that the validity, construction and interpretation of this agreement shall be governed by the law of India.

B. RIL and PHOENIX hereby agreed to submit to arbitration in London, England any disputes arising hereunder. Such arbitration shall be conducted by three arbitrators in the English language in accordance with the rules then in force of the International Court of Arbitration, London, England. The appointment of the arbitrators shall fall on such persons as the parties may appoint by mutual agreement within a period not to exceed 30 days from the statement by either of the parties that it intends to submit the matter to arbitration, or if not agreed by the parties on such arbitrators as may be appointed by the President of the International Court of Arbitration. The arbitrator shall render an award within a period not to exceed one month from the arbitrator's acceptance, and the parties undertake to observe all the terms of said award. Any expenses incurred in such arbitration shall be awarded as the arbitrator shall decide. In the event for whatsoever reason that the dispute is not resolved within 90 days of written notice to the other Party, either Party may terminate this agreement with immediate effect. The arbitration agreements contained in this section shall be governed by the internal laws of England."

90 2018 SCC OnLine Del 12231.

The issue for the court was maintainability of the petitions under section 34 of the 1996, given the fact that awards were result of arbitration seated in London and governed by rules of International Court of Arbitration, London. Also, the arbitration agreement was to be governed by laws of England. Given the fact that the arbitration agreement was pre-BALCO, petitioners contended in favour of maintainability of section 34, despite above factors.

The petitioners based their case for maintainability of petitions under section 34 of the Act on three grounds: that a petition can be filed under section 34 given the fact that the case concerned itself with a pre-BALCO agreement, it will be governed by the ratio laid down in Bhatia International, which prescribed that Part I of the 1996 Act is applicable to the foreign seated arbitration unless excluded expressly or impliedly by the parties to the contract part I of the Act is applicable; that there was no express or implied exclusion of Part I by the parties, and that respondent had accepted jurisdiction of Indian courts under section 34 not having challenged it at the time when petitioner challenged partial award or even when it filed response to petitioner's challenge to final award. Also, the dispute between the parties related to section 4 of the agreement which related to exercise of call option of shares, and the contention of petitioners was that arbitration agreement under section 11(B) were not applicable to disputes arising under section 4 of the agreement.

The task for the court, as also contended by the respondents was to see whether, the above choices in the arbitration agreement were sufficient to construe implied exclusion of Part I of the Act. Another important question to be decided by the courts was whether failure of respondents to challenge applicability of part I and jurisdiction of Indian courts at the stage of challenge to the partial award and also in the first instance of resisting challenge to the final award can confer jurisdiction on Indian courts under section 34 of the 1996 Act.

The High Court of Delhi answered the first question in affirmative and the second one in negative. Citing 2014 Supreme Court judgement in the *Reliance Industries* v. *Union of India,*[91] the court held that choice of seat as London and law governing arbitration agreement as English was sufficient to construe exclusion of Part I of the 1996 Act. It was also held that failure to challenge jurisdiction at the first stage cannot confer jurisdiction where none exists under law. The court held, the fact that in its initial reply filed, the respondent did not take this objection, does not mean that the objection cannot be raised at this stage. In any event, the respondent has filed a specific additional reply taking an objection as to the maintainability of the present petition. In *Roger Shashoua* v. *Mukesh Sharma*[92] the Supreme Court has clearly held that even if a party has wrongly approached the Court in India and accepted the applicability of Part-I of the Act, the same would not confer jurisdiction on Indian Courts.

91 2014) 7 SCC 603.

92 2017 (14) SCC 722.

High Court of Delhi went on endorsing territoriality principle and implied exclusion of the 1996 Act in *Delhi Airport Metro Express Pvt. Ltd.* v. *Construcciones Y. Auxiliar de Ferrocarriles*[93] as it rejected application filed under section 34 of the 1996 to challenge an award obtained from London seated arbitration proceedings. The case involved two contracts- a supply contract and maintenance contract. Governing law of the contract in both cases was Indian law. Article 22 of the Supply Contract reads as follows:

> Any dispute arising in connection with the interpretation or performance of this Contract shall be finally settled by arbitration under the rules of the International Chamber of Commerce, Paris ("ICC").
>
> The seat of the arbitration shall be London and the language of the arbitration shall be English.

Article 14 of the Maintenance Contract reads as follows:

> The arbitration shall take place in London and the language of the arbitration shall be English.
>
> The parties expressly exclude the application of Part 1 of the Indian Arbitration and Conciliation Act, 1996.

Upholding principle of territoriality the High Court of Delhi laid importance to two facts: first, that in both contracts choice of seat was London and that in one of the contracts parties had expressly excluded application of Part I of the 1996 Act.

Another case in the series which exemplifies Indian judiciary's continuing endorsement of territoriality principle is the Bombay High Court judgment in *Katra Holdings Ltd.* v. *Corsair Investments Ltd.*[94] The dispute in *Katra* Holdings arose in relation to several transactions under a Restated Escrow and Transaction Settlement Agreement dated May 12, 2007 (the RETS Agreement) between the parties. Clause 15 of the RETS Agreement entailed that the disputes, if not settled in good faith, shall be submitted to arbitration to be conducted in accordance with AAA Rules and *'the place of arbitration shall be New York, New York or such other place as may be agreed upon by the parties'*. Clause 16 provided that the RETS Agreement shall be governed by the laws of India except in relation to certain specified provisions, which shall be governed by New York law. A three member arbitral tribunal passed the final award in New York, US. The award was challenged under section 34(2)(ii)(b) of the Act before the High Court on the grounds of public policy. However, a preliminary objection was raised on the maintainability of the application based on the contention that Part I of the Act stood excluded parties having chosen New York as the juridical seat of arbitration. The issues before the High Court of Bombay were to determine, first whether the seat of arbitration was in India or outside India and second, what was the law governing arbitration agreement.

93 2018 SCC OnLine Del 12173.

94 2018 SCC Online Bom 4031.

The High Court of Bombay relied on *Reliance Industries*[95] which further expounded *Bhatia International* to clarify that where the juridical seat is outside India or where the law other than Indian law governs the arbitration agreement, Part I of the Act would be excluded by necessary implication. The High Court of Bombay noted that since the parties had agreed that arbitration proceedings would be conducted in New York in accordance with the AAA Rules, the Seat of arbitration was New York. The court also reached the conclusion that proper law of arbitration agreement was law of New York, taking into account the fact that the petitioner had himself relied on law of New York to decide the issue whether non-signatories to the arbitration agreement can be made parties to the dispute. The court dismissed the application filed under section 34 with the conclusion that Part I of the Act stands excluded given the fact that seat of arbitration was outside India and the law of arbitration agreement was also a foreign law.

Applicable law to determine interest on award

An important area requiring resolution of conflict of laws is relating to law applicable in calculating the interests on awards. The apex court addressed this issue in *Vedanta Ltd.* v. *Shenzen Shandong Nuclear Power Construction Co. Ltd.*.[96] The case involved four interrelated contracts for the construction of a 210-MW Co-Generation Power Plant, between petitioner, an Indian company and a company incorporated in People's Republic of China. Each of the contract had an identical arbitration clause, wherein seat of arbitration was Mumbai and arbitration was to be governed by the Indian Arbitration and Conciliation Act,1996. The proper law of contract was chosen to be Indian law and the courts in India was to have exclusive jurisdiction for litigation. The termination clause provided that in the event of termination, the purchaser shall pay 105% of the cost incurred by the supplier as compensation. The EPC contracts did not contain any provision on payment of interest.

Disputes arose between the parties, which resulted in the termination of the EPC contracts. The disputes emanating out of the EPC contracts were referred to arbitration by a three-member tribunal in terms of the agreement between the parties. The arbitral tribunal passed a detailed award in favour of the claimant. The award debtor filed a challenge to the award under section 34 of the 1996 Act. The challenge was restricted to the rate of Interest awarded by the arbitral tribunal.

The court considered the challenge on the Interest awarded by the Tribunal in the peculiar facts and circumstances of the case, and the specific clauses of the contracts in question. The court noted that the current practice of awarding Interest in international commercial arbitrations is riddled with inconsistencies, and is criticized for lack of uniformity in international contracts, there is no consensus on the method or rate of awarding Interest.

It was held that in an international commercial arbitration, in the absence of an agreement between the parties on Interest, the rate of Interest awarded would be

95 *Supra* note 91.

96 AIR 2018 SC 4473.

governed by the law of the seat of arbitration. The rate of interest awarded must correspond to the currency in which the award is given, and must be in conformity with the laws in force in the *lex fori*. Applying provisions of the 1996 Act, the court held that the award of interest by the tribunal as unjustified and arbitrary.

Determination of juridical seat in international commercial arbitration

International commercial arbitration, it is well known, carries huge possibilities for conflicts of law and jurisdictions. Concept of seat has been one of the most important tools to resolve the above conflicts. While seat is an important tool to determine which courts would have supervisory jurisdiction, more so where the award can be challenged and set aside, an important issue faced by the courts is how to determine seat of arbitration in a situation where the agreement does not make an express statement as to the seat of arbitration.

The apex court was faced with the above question in the case of *Union of India* v. *Hardy Exploration and Production (India) Inc.*[97] The parties in this case had entered a production-sharing contract in November 2016 (PSC) for the extraction, development and production of hydrocarbons in a geographic block in India. Disputes arose between the parties as the Union of India allegedly relinquished the rights of Hardy Exploration and Production (India) Inc. (HEPI) to the geographic block prematurely. HEPI initiated arbitration proceedings against the Union of India for re-entry to the geographic block and payment of interest on its investment. The arbitral tribunal rendered its award in favour of HEPI in February 2013. The award was signed and declared in Kuala Lumpur.

The Union of India approached the High Court of Delhi for setting aside of the arbitral award under section 34 of the Arbitration and Conciliation Act 1996 (the Act). HEPI opposed this application stating that the award was a 'foreign' award as the seat of arbitration was Kuala Lumpur. The High Court of Delhi ruled that place of making the award was Kuala Lumpur and section 34 of Part I the Act would not apply.2 The Union of India appealed the judgment of the High Court of Delhi before the Supreme Court.

Union of India took the stance that Kuala Lumpur was only the venue of the arbitration and not the seat. As per the agreement between the parties, governing law of contract was Indian law, arbitration was to be conducted in accordance with the UNCITRAL Model law on international commercial arbitration. In relation the place of the arbitration, the arbitration clause mentioned:

The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English language.

Since the arbitration clause used the word venue instead of seat the issue before the court was how to interpret the above clause. The Supreme Court noted that an arbitration clause must be read holistically to understand its intentions to determine the seat of arbitration. The Supreme Court clarified that there is no confusion with regard to the difference between the venue and the seat of arbitration. The court ruled

97 AIR 2018 SC 4871.

that, the 'venue' of an arbitration could not, *ipso facto*, be considered to be its 'seat' and that the 'place' could be equated with 'seat' only if it had no conditions precedent attached to it: "*The term 'place' does not ipso facto become equivalent to 'seat', and only when one of the conditions precedent is satisfied can the 'place' take the position of 'seat'. On the other hand, however, the term 'venue' can become 'seat' if something else is added to it as a concomitant."*

If the intention of the arbitration clause through a choice of venue and appended factors leads to conclusion that the seat is outside India, Part I of the Act will be excluded.

On the facts before it, the court ruled that since the arbitration agreement did not provide for a seat, the determination of the seat would have to be made by the arbitral tribunal. The court held that merely because the arbitrator had "*held the meeting at Kuala Lumpur and signed the award… does not amount to determination… The sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration…"* On this basis, the court set aside the decision of the High Court of Delhi and found that Indian courts would have jurisdiction to entertain the section 34 challenge. Thus, although the court rightly reiterates the distinction between seat and venue, what has been left unexplained is the criteria for determination of seat for those contracts where the arbitration agreement does not explicitly mentions a seat.

That above clarification was essential became clear from the subsequent judgment of the Delhi Court in the case of *Drager Medical GmbH* v. *Ion Bio Med-I Care Pvt. Ltd.*[98] The case involved an execution petition filed by the decree holder Drager Medical under section 36 of the Arbitration and Conciliation Act, 1996 seeking execution of ICC's International Court of Arbitration award dated June 29, 2012. Maintainability of execution petition under section 36 was challenged by the award debtor Ion Bio Med-I-Care Pvt. Ltd. with the contention that award was a foreign award. The award debtor filed objections under section 48 of the Act. Drager Medical was a company engaged in the business of manufacture, supply and sale of highly specialised equipment used by the medical profession in treatment of patients. *M/s. Ion Bio Med-I-Care Pvt. Ltd.*, the judgment debtor, was a company, which was incorporated as a joint venture pursuant to a Joint Venture agreement between Dragerwerk AG and Usha Services Pvt. Ltd, both of which had equal equity participation in the judgment debtor. The judgment debtor was appointed as the exclusive distributor in India of medical equipment manufactured by the Decree Holder. A 'Distributor Agreement' to this effect dated February 22, 1999 was duly entered into between the parties. Supplies were made by the decree holder to the judgment debtor from time to time. Disputes arose due to irregular payments by the judgment debtor company and several outstanding payments. The decree holder invoked arbitration by the international court of arbitration, and the arbitral tribunal passed award in favour of the decree holder. As the time for challenging the award, i.e. three

98 2018 SCC Online Del 12224. For determination of Seat also see another judgement, *Dredging Corporation of India Ltd.* v. *Mercator Ltd.*, 2018 SCC OnLine Del 11930.

months, expired, hence the execution petition was filed. Decree holder raised objections to the judgment debtor's objections under section 48 of the Act and also those challenging maintainability of the execution petition with the contention that the award in the present case is a domestic award and hence the judgment debtor ought to have challenged the said award under section 34. Nature of the award as domestic or foreign came to be contended given the fact that arbitration clause was not clear about seat of arbitration. The arbitration agreement read as under:

26. Applicable Law

This Agreement shall be governed, construed and interpreted in accordance with the German laws. However, the cogent prescriptions concerning (German) domestic commercial agents" shall not apply. The United Nations Convention on Contracts for the International Sale of Goods shall not apply.

27. Arbitration

All disputes arising in connection with this present Agreement shall be exclusively and finally settled under the Rules of Conciliation and Arbitration of the International

The language of the arbitration proceeding shall be English.

The arbitration proceeding shall be held in New Delhi, India.

While initially governing law of the contract was German laws, parties subsequently changed it to Indian law. The High Court of Delhi concluded that award was a domestic award giving weightage to the following elements: (i) governing law of the contract was Indian law; (ii) law governing the arbitration agreement was not mentioned and; (iii) arbitration proceedings were held in Delhi.

Award debtor had also drawn attention of the court towards the fact that an application seeking reference to arbitration in the present case was filed by the decree holder under section 45 of the Act. However, the court did not find the section 45 application at an earlier stage as an obstacle in concluding that New Delhi was seat of arbitration and therefore award was to be considered a domestic award enforceable under part I of the 1996 Act. However, the court decided to condone the award debtor's failure in challenging the award under the time period stipulated under section 34 of the Act. The court took note of the fact that reference to arbitration was made under section 45 of the Act. It accepted that an application under section 45 by the decree holder was a valid reason for creating confusion about nature of award as domestic or foreign. The court considered the understanding or belief of the judgment debtor that the award was a 'foreign award' as a *bona fide* error of law. Based on above confusion the court granted time to the judgment debtor to file objection under section 34 of the Act. The court held:

> Thus, the Judgment Debtor, under the presumption that since the reference was made under Section 45, the award was in fact a foreign award, waited for the Decree Holder to seek enforcement of the award. However, what the Decree Holder did in the present case was to treat the award as a domestic award and straightway filed the execution petition after the limitation period under Section 34 elapsed.

Thus, though prior to the passing of the award, both the parties proceeded under the presumption that the proceedings are governed by Part-II, in the execution petition, the decree holder has taken a stand that it is a domestic award. Since there was an impossibility for the judgment debtor to challenge the award, if it was a foreign award, and since it has been held today by this court, that the award is a domestic award, the limitation to challenge the award, would begin from now.

Thus, declaring award to be domestic award it gave opportunity to the award debtor avail legal remedies under section 34 and 36 of the Act.

Concept of seat in India seated/domestic arbitration

While concept of seat is well entrenched in Indian law relating to international arbitration, an important development in recent years has been introduction of this concept in Indian seated international arbitration as well as in domestic arbitration. Seeds of above development were sown in the famous BALCO case. However, recent judgments of the apex court have imparted these seeds their full bloom. Beginning was made in this direction through the apex court judgement of *Indus Mobile Distribution Private Ltd.* v *Datawind Innovations Pvt. Ltd.*[99] Recent judgment of the apex court in *Emkay Global Financial Services Ltd.* v. *Girdhar Sondhi*,[100] takes it forward, as it reiterates the principle that designation of seat in arbitration agreement is akin to exclusive jurisdiction clause. In other words *Emkay Global* reiterated the position that in matters relating to arbitration, parties can confer authority to exercise supervisory jurisdiction on such courts which are otherwise unconnected with the matter. The case is also important as it applied distinction between seat and venue also for domestic arbitration.

The Supreme Court reiterated above position while deciding an appeal which arose out of a dispute between the appellant, who was a registered broker with the National Stock Exchange, and the respondent, its client, regarding certain transactions in securities and shares. The respondent had initiated an arbitration proceeding against the appellant, claiming an amount of Rs. 7,36,620/-, which was rejected by the sole arbitrator vide an arbitration award dated August 8, 2009. The appeal arises out of an agreement dated July 3, 2008. According to this agreement, the parties had agreed to abide by the provisions of the Depositories Act, 1996, SEBI (Depositories and Participants) Regulation, 1996 Bye-Laws and Operating Instructions issued by CDSL from time to time in the same manner and to the same extent as if the same were set out herein and formed part of this agreement. The agreement had an arbitration clause and an exclusive jurisdiction clause which conferred jurisdiction on the courts of Mumbai.

The arbitration proceedings took place under the National Stock Exchange bye-laws. National Stock Exchange referred the dispute to one Mahmood Ali Khan, who held sittings in Delhi, and delivered an award dated December 8, 2009, whereby the respondent's claim was rejected. The respondent then filed a section 34 application

99 2017 SCC OnLine SC 442.
100 (2018)9 SCC 49.

under the Arbitration and Conciliation Act, 1996 on March 17, 2010 before the District Court, Karkardooma, Delhi. Respondent contended that courts in Delhi would have jurisdiction given the fact that Delhi was the seat of arbitration. The apex court rejected contention of the respondent that Delhi was seat of arbitration, declaring Delhi as merely a venue. It was held that once courts in Mumbai have exclusive jurisdiction thanks to the agreement dated July 3, 2008, read with the National Stock Exchange bye-laws, it is the Mumbai courts and the Mumbai courts alone, before which a section 34 application could be filed.

Enforcement of foreign arbitral awards

In *Shriram EPC Limited* v. *Rioglass Solar S.A.,*[101] the issue raised was whether a foreign award requires payment of stamp duty under the Indian Stamp Act, 1899 for its enforcement in India. Factually speaking the respondent herein filed a petition to enforce the foreign award. Objections under section 34 of the Arbitration and Conciliation Act,1996 were filed by the appellant which were dismissed by single judge on the ground that petition under section 34 of the Act would not be maintainable as against a foreign award. Appellant further challenged the award on the ground that the award had not been stamped. Hence the present appeal. Briefly the related facts are, An ICC award was delivered in London on February 12, 2015 holding the appellant for breach of the agreement and ordered the appellant to make payment to the Respondent, the damages and interest. The respondent's petition for the enforcement of the foreign award was filed before the High Court of Madras which dismissed the appellant's objections under section 34 of the 1996 Act following the apex court ruling in BALCO.[102]

The Supreme Court after a detailed study of the Indian Stamp Act, 1899 along with the development of and changes in the Indian arbitration law including the international commercial arbitration, held that "the fact that a foreign award had not borne stamp duty under the Indian Stamp Act, 1899 would not render it unenforceable". In this context the Supreme Court observed: [103]

> The fundamental policy of Indian law as has been held in *Renusagar Power Co. Ltd* v. *General Electric Co*. (1994 Supp (1) SCC 644) and followed in *Associate Builders* v. *Delhi Development Authority* (2015) 3 SCC 49 makes it clear that if a statute like the Foreign Exchange Regulation Act, 1973 dealing with the economy of the country is concerned, it would certainly come within the expression "fundamental policy of Indian law". The Indian Stamp Act, 1899 being a fiscal statute levying stamp duty on instruments, is also an Act which deals with the economy of India and would, on a parity of reasoning, be an Act reflecting the fundamental policy of Indian law.

The apex court accordingly held the fact that a foreign award has not borne stamp duty under the Indian Stamp Act, 1899 would not render it unenforceable.

101 AIR 2018 SC 4539

102 *Bharat Aluminium Co*. v *Kaiser Aluminium Technical Services Inc*. (2012) 9 SCC 552.

103 *Supra* note 101, paras 24, 25.

In *Kandla Export Corporation* v. *Oci Corporation,*[104] an award was passed directing the appellants (who are the sellers) to pay the respondents (who are the buyers) a sum of US $ 846,750 together with compound interest. On appeal the appellate tribunal directed the appellants to pay a sum of US $ 815,000. The respondents, on their part, filed an execution petition under section 48 of the Arbitration Act ,1996 before the District Court in Kutch. Respondents further preferred an application before the High Court of Gujarat under Commercial Court Act to transfer the execution petition to the high court. The High Court of Gujarat dismissed the objections filed by the appellants and allowed the execution petition filed by the respondents. Appellants aggrieved sought a route through Commercial Courts Act by way of an appeal, which was dismissed on the ground that Commercial Courts Act did not provide any additional right of appeal which is not otherwise available to the appellants under the Arbitration Act. Section 50 of the Arbitration Act only provided for an appeal in case a petition to enforce a foreign award is rejected.

The apex court after hearing the counsel for both the parties, dwelt on both the enactments, namely, the Commercial Courts Act as well as the Arbitration Act,1996 (in terms of the detailed Arbitration Amendment Act, 2015). The Supreme Court observed in this case that section 50 of the Arbitration Act contains the provision of appeal in a much limited framework – concerned only with the enforcement of the New York Convention Awards. The court emphasized that in all arbitration cases of enforcement of foreign awards it is section 50 alone that provides for an appeal.

In *Daiichi Sankyo Company Limited* v. *Malvinder Mohan Singh,*[105] the petitioner filed his petition under Part II of the Arbitration and Conciliation Act,1996 seeking enforcement and execution of the foreign award passed. The controversy revolves around a Share Purchase and Share Subscription Agreement (SPSSA) whereby the petitioner agreed to purchase from the respondents their total stake in Ranbaxy Laboratories Limited, valued at INR 198 Billion (US$4.6 Billion Dollars). Disputes having arisen between the parties, the petitioner invoked the arbitration clause. The arbitration to be led by the International Chamber of Commerce (ICC) at Singapore. The applicable procedural law of arbitration was to be the International Arbitration Act of Singapore and the governing law was to be the laws of Republic of India.

The petitioner claims to have suffered direct and indirect losses as a result of having entered into the SPSSA relying upon the false picture painted by the respondents. It is the case of the petitioner that but for the fraud it would not have acquired Ranbaxy shares and has thereby suffered loss and damages. The petitioners invoked arbitration clause seeking compensatory damages equivalent to US $1.4 Billion. The respondent raised number of defences before the tribunal including the contention that the award is contrary to the Fundamental Policy of Indian law, morality and justice and, therefore against the public policy of India, relying mainly on section 48(1) (C) and section 48 (2)(b) of the Arbitration Act,1996.

104 MANU/SC/0112/2018.

105 MANU/DE/0405/2018.

The court observed: [106]

> Regarding Section 48 (2)(b) the Supreme Court in *Renusagar* v. *General Electric* held, this would imply that the defence of public policy which is permissible under section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by these words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

While interpreting section 48 of the Arbitration and Conciliation Act, 1996 the court referred to the apex court's exposition thus, "In our view, what has been stated by this court in Renusagar with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of Section 48(2)(b) of the 1996 Act. In Renusagar, it has been expressly exposited that the expression "public policy" in section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression 'public policy' used in section 7(1)(b)(ii) was held to mean 'public policy of India'. A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in Renusagar. For all this there is no reason why Renusagar should not apply as regards the scope of inquiry under section 48(2)(b). following Renusagar, we think that for the purposes of section 48(2)(b), the expression 'public policy of India' must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories enumerated in Renusagar. Although the same expression 'public policy of India' is used both in section 34(2)(b)(ii) and section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the sections but, in our view, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award…."

We accordingly hold that the enforcement of foreign award would be refused under section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in section

106 *ONGC* v. *Saw Pipes Ltd.* (2003) 5 SCC 705) at para 31. This position was reiterated by the Supreme Court in *Lal Mahal Ltd*. v. *Progetto Grano Spa* (2014) 2 SCC 433.

34(2)(b)(ii) in *Saw Pipes* case is not applicable where objection is raised to the enforcement of the foreign award under section 48(2)(b).

Moreover, section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award enforcement stage. The scope of inquiry under section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/ rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign awards some error has been committed. Under section 48(2) (b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall under section 48(2)(b).[107]

The court continuing its inquiry of scope of section 48 pointed out, "the expression 'Fundamental Policy of Indian law' does not mean the provisions of Indian statutes. The keywords are Fundamental Policy, they connote the substratal principles on which Indian law is founded.[108] Further the court also said, "It plainly follows from the above that a contravention of a provision is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression 'fundamental policy' connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country."[109]

After a thorough analysis of the enforcement of foreign arbitral award, the court also looked into the question whether the award is in contravention of the fundamental policy of Indian law. The court opined on this issue relying on the landmark case, *Renusagar Power Co. Ltd.* v. *General Electric Co*. It was laid down therein that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds.[110]

In *Django Navigation Ltd.* v. *Indo Ferro Metal Private Ltd.,*[111] an application under section 48 in chapter I of Part II of the Arbitration and Conciliation Act, 1996 has been filed in the matter of foreign arbitral award passed in London. The parties

107 *Id*.,para 32.
108 *Id.*, para 33.
109 *Id.*, para 34.
110 *Id*., para 67.
111 MANU/RH/0086/2018.

are Django Navigation Ltd. of Liberia and Indo Ferro Metal Private Ltd. of India (Jaipur). The petitioner company is in the business of owning and chartering out ships. The respondent is in the business of import and export of various commodities like minerals, ores and Indonesian coal. The foreign award from London, UK, a reciprocating territory notified by the Government of India, and is therefore enforceable under the Arbitration and Conciliation Act,1996. The petitioner company is incorporated in Liberia, having its office in Liberia. The foreign award has been passed in favour of the petitioner pursuant to the Charterparty and the arbitration clause contained therein between the respondent as the Charterer and the petitioner as the owner of the vessel MV Vantage, key chartered to the respondent, The Charterparty in its clause states, "English law ARB London/LMAA Rules Apply."

Disputes arose between the parties due to respondents' failure to provide cargo for the vessel. This resulted in breach of contract entitling the petitioner to terminate the Charterparty and recover damages. Disputes and differences having arisen between the parties, the petitioner sent an arbitration notice to the respondent. The respondent failed to appoint their arbitrator and also failed to submit their submissions. The sole arbitrator thereafter passed its final reasoned award on the merits of the case.

It was contended by the respondent against the petitioner's claim for damages that the agreement between the parties has not been established, and that there is no clarity on the law to be applied in case of dispute. Further it was also argued that the parties have not entered into any formal written agreement. According to the respondent, the delay in shipping the cargo caused due to force majeure reasons and therefore the award was against the objections raised by the respondent.

We accordingly hold that enforcement of foreign award would be refused under section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in section 34(2)(b)(ii) in *Saw Pipes* is not applicable where objection is raised to the enforcement of the foreign award under section 48(2)(b).[112]

After a detailed analysis of facts and law, the court ruled the foreign award as decree of the court, binding the parties, and is liable to be enforced under section 48 of the Act.

VI FOREIGN JUDGMENTS

The appellant in *Renu Bala* v. *Vijay Kumar,*[113] *her* former husband to pay GBP 76,000 as per decree passed by Wolverhapton County Court, England. Briefly, the relevant facts were, the appellant and the respondent were married in the UK in 1995 and they have a daughter born out of the wedlock in 2005. Due to matrimonial disputes parties started living separately from 2009. The appellant initiated dissolution of marriage proceedings in UK in 2010.

112 *Id.*, paras 27 and 29 as quoted in the judgment.

113 MANU/DE/0147/2018.

In the final order the court dismissed cross objections and the pleas of the respondent and ordered the execution proceedings in accordance with section 44-A of the Civil Procedure Code, 1908,

VII CONCLUSION

In conclusion, it is clear that there are very many decisions concerning conflict of laws before the Indian judiciary. The number of cases are on the increase indicating progressive development of private international law in India. Of these, interaction on the social issues are more visible. To be specific, issues concerning children are more in number. Almost every decision regarding parental removal of children are stressing the importance of the principle of welfare of the child. It is also clear that majority of such removals are due to sufferings caused by domestic violence. Of all the issues resulting in child abductions, the courts have placed welfare of the child as singularly significant, and these cases are on the increase.

Issues concerning international trade and commerce have also figured in the survey. Particularly matters concerning admiralty jurisdiction and shipping laws. India's state practice in areas like welfare of the child and admiralty jurisdiction has been prominent.